IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ——

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 139 F. (2d) 28.

JURISDICTION.

The jurisdiction of this Court is invoked by reason of the errors specified in the Specification of Errors hereinabove set out and pursuant to Secs. 451-466, incl., Title 28, U. S. C. A.

QUESTIONS PRESENTED, SPECIFICATION OF ERRORS TO BE URGED AND STATEMENT OF THE CASE.

A statement of the questions presented, specifications of errors to be urged, and statement of the case will be found in the foregoing petition.

Argument.

Preliminary—

The two following general rules are important in considering the specific errors on which the petitioner relies, viz—

(a) "* * * where he," (the accused), "is conducting his own defense, the record must be closely scrutinized to see that his rights in endeavoring to maintain his innocence, have been protected." (17 C. J. §3541, p. 202.)

(b) "It was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants, * * *." (Commonwealth v. Sacco, 255 Mass. 369, 151 N. E. 830; See also Brower v. State, 221 P. 1050, 24 Okla. Crim. 49: 23 C. J. S. §1081, p. 519.)

"He," (District Attorney), "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. U. S., 295 U. S. 86, 88, 79 L. Ed. 1321.)

I.

The refusal of the Courts below to hold that payment of alleged expert's fees violated the two Statutes above described, and the statutory procedure provided thereby, and resulted in denying petitioner a fair and impartial trial and violated his constitutional rights.

(a) The trial involved here took place between October 1938 and February 1939, and §601 of Title 28, U. S. C. A., was in force during that time and until December 24, 1942, and provided that—

> "'Witness shall be paid for each day's attendance in Court, * * *, $1.50 and 5 cents a mile for going from the place of residence to place of hearing, and 5 cents a mile for return.''

(b) The Department of Justice Appropriation Act, 1939, Act April 27, 1938, c. 180, 52 Stat. 268, making an appropriation for the payment of witness fees, contains a proviso—

> "'* * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50,''

being for the fiscal year from July 1, 1938 to July 1, 1939, and for the period covered by the trial herein. (See *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, 447.)

(c) "Apart from Statute it may be laid down as a general rule that an expert witness may be compelled to testify as to matters of professional opinion, or matters of which he has gained a special knowledge by reason of his professional training or experience, without any compensation other than the fee of an ordinary witness.'' (Bradley v. Davidson, 47 App. D. C. 285; see also Dickson v. People, 168 Ill. 179, 39 L. R. A. 116, 48 N. E. 108; and Stevens v. Worcester, 196 Mass. 45, 56, 81 N. E. 907 and 40 Cyc. 2187, all three cited in Bradley v. Davidson, supra.) See also Henkel v. Chicago, St. Paul, M. & O. Ry. Co., supra.

(d) The violation of said §601 and of said Appropriation Act by paying more than these Statutes permitted, was a violation of procedure in the trial, which deprived petitioner of his constitutional rights requiring that the judgment of conviction be reversed.

Here, there was a violation not only of the general rule as laid down in said §601, but of the prohibition in the Act appropriating monies for the period when the trial took place. Not only do the cases, as appears from the citations above, hold that no expert fees could be paid, but there could be no claim of inadvertence or oversight by Congress,—an examination of the index of the Statutes (U. S. Code, 1940 Ed.), under the title "Witnesses" shows by a multitude of instances that Congress has been most particular in passing Statutes as to attendance of witnesses and payment of their fees.

Walker v. *Johnson*, 312 U. S. 275, holds that a violation of the procedure fixed by Statute requires reversal of a criminal conviction.

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen." (Miller v. U. S., 120 F. (2d) 968, 969, 973.)

In *Weiss* v. *U. S.*, 308 U. S. 321, the government offered in evidence phonograph records and typewritten transcripts of telephone messages to and from the accused, obtained by tapping his lines. The authenticity of the messages was proved by certain defendants turning State's evidence and being paid considerable amounts previous to the trial. The court held,—

> "It is not too much to assume the interdiction of the Statute was intended to prevent such a method of procuring testimony,"

thus condemning, not alone the tapping of the wires, but the large payments made, as here, to witnesses, who, in the case cited had turned State's evidence. This Weiss case condemns specifically such unauthorized payments of witnesses as were made in this case.

(e) The trial court and the Circuit Court of Appeals both mistakenly held that petitioner's contention that the payments made to the so-called experts was bribery depended on inference alone, whereas the witnesses were entitled only to $1.50 a day and the payment of the excess was of amounts to which they were not entitled and to induce them to testify, as, without such payment, it was their legal duty to do, and the making and accepting of such payments in excess of the amounts permitted by the Statutes constituted bribery.

> "'Bribery' under the common law is the giving or receiving of anything of value or any valuable service, intended to influence one in the discharge of a legal duty; gist of the offense being tendency to pervert justice." (People v. Peters, 106 N. E. 513, 515, 265 Ill. 122, Anno. Cas. 1916-A 813.)
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> "To constitute the offense of bribing a witness to avoid process there must have been a process either issued or served." (Harrison v. State, Tex., 151 S. W. 552, 553.)
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> See also, People v. Van DeCarr, 84 N. Y. S. 461, 463, 87 App. Div. 386; Commonwealth v. Bell, 22 A. 641, 644, 145 Pa. 374; Commonwealth v. Benedict, 173 A. 850, 114 Pa. Sup. 183; Walsh v. People, 65 Ill. 58, 65, 16 Am. Rep. 569.
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> "Bribery may be defined to be the giving (and perhaps offering) to another anything of value, or any valuable services intending to influence him in the discharge of some legal duty." (Dishon v. Smith, 10 Iowa 212, 221; 1 Words & Phrases, p. 868.)

Petitioner had no knowledge that the witnesses were experts or that they were qualified as such, and nothing was

said in court to that effect. This was emphasized by petitioner asking witness Tarr what he was and he answered that he was getting $25.00 a day while at the property, whereas he was paid expert's fees for eight days, ($200.00), (Tr. 6), although he testified only on two days (Tr. 7 & 45). Moreover, Tarr went to the mine but once and that was during the first trial, and so was paid for five days at the property in June and July, and was paid solely for attendance at this, the second trial (Tr. 6). So, his answer was contrary to the facts and clearly intended to be so, both in the circumstance that he was not paid at the second trial for being at the property and that he was paid on the second trial for testifying and only for testifying. Downing was paid for ten (10) days as a witness, ($250.00), (Tr. 6), besides $262.25 as travel fees. Downing testified one day only (Tr. 27), but was paid witness fees at $25.00 per day for ten days. Evans testified one day and was paid for 2 days at $25.00 per day ($50.00), (Tr. 6, 27). (Id), a clear violation of the Appropriations Act passed April 27, 1938, which provides,—

> "* * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50, * * *."

II.

That the District Court erred in excluding testimony as to bias or prejudice of the so-called expert witness Tarr, and in limiting the proofs to corruption and bribery of him, which proof, so excluded, would have shown that petitioner was denied a fair and impartial trial.

(a) Evidence as to bias or prejudice was excluded and the proof limited to corruption and bribery. Petitioner alleged in his petition that the witness Tarr sought employment of the owners of the mines, for selling stock in which petitioner was indicted, and because he was refused

such employment and for the payment the government made him, testified corruptly. (Tr. 8). Petitioner asked to prove that Tarr went to the owners of the mine in 1937 and asked for a job, and told the owners that the property was valuable, and then in 1939 testified that there was no coal there and the property was worthless. The court limited the testimony to bribery. (Tr. 55-56.)

(b) The exclusion of this evidence was highly prejudicial error. The facts that petitioner offered to prove were known to him only shortly before the argument in this proceeding in the trial court. It was the duty of the District Attorney to swear only unbiased and fair witnesses and his violation of this duty resulted in petitioner's being denied a fair and impartial trial,—

> "It was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants," Attorney-General, petitioner; 104 Mass. 537, 544. "And if, through the purposed conduct of the representatives of the Commonwealth, prejudice was deliberately created, the question would be presented whether justice had been done, and if not done, whether a new trial, at least as to the defendant Sacco, should be ordered." (Commonwealth v. Sacco, 151 N. E. 830; 255 Mass. 369.)
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> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (Lisenba v. Calif., 314 U. S. 236, 237, 86 L. Ed. 180.)
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> "* * * in Martin v. United States (1927; C. C. A. 5th) 17 F. (2d) 973, * * * the court said: 'There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown at the time of the original trial', * * *."

The Court in *Larrison* v. *U. S.*, 24 F. (2d) 82, laid down as requiring a new trial, the following tests,—

1. That "the court is reasonably well satisfied that the testimony given by a material witness is false," and here the petitioner offered to prove that the testimony of the witness Tarr was false;

2. that "without it, the jury might have reached a different conclusion," and here the false testimony was on the one issue involving guilt or innocence,—whether the mine was worthless or valuable;

3. that "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial," which was the case here;

4. The trial court should have heard the evidence which was excluded,—

   "* * * Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (Walker v. Johnson, 312 U. S. 286, 85 L. Ed. 836.)

   "Evidence by other than person charged with bias is proper and exclusion of such testimony to show such bias is error." (Davis v. Ivey, Fla., 112 So. 264.)

III.

The District Court erred in excluding evidence that (although paid fees as expert witnesses), the three witnesses, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, were not qualified as experts and did not testify as such, as in such case the payment of so-called expert's fees to witnesses not experts violated said Statute fixing the fees of witnesses and the established procedure in that respect, and the petitioner was thereby denied a fair and impartial trial.

(a) The fact that the witnesses, Tarr, Downing and Evans, did not qualify as experts or testify as such was raised by the petition (Tr. 7); and it was alleged that payment of expert's fees to the witnesses Tarr, Downing and Evans was to induce them to testify falsely that coal does not exist in commercial quantity in the mine involved here. (Tr. 7, 9.)

The Government answer alleged that the so-called experts were called as such and received compensation as experts (Tr. 18), but fails to allege that they were qualified or testified as such. All that could be claimed in this respect is that the government denies all allegations not specifically denied, but this could not in fairness be claimed to embrace the statement lacking as to qualifications and swearing, since the allegations of what the government deemed material as to these witnesses was specifically denied.

Then, on the hearing petitioner stated that he did not know that these witnesses were experts (Tr. 43, 45), and that when he asked Tarr what he was, the witness answered that he was getting $25.00 a day while at the property, thus concealing the payment to him while on the stand. (Tr. 45.)

The court, who did not preside at the trial and who stated that he did not read the transcript (Tr. 40), ruled that the transcript showed that the witnesses expressed opinions, (when in fact, the testimony of none of the three witnesses,

Tarr, Downing or Evans, was ever transcribed), and that petitioner should have discovered by cross-examination that these witnesses were experts, that he was bound to know it and, though not in words, in effect and in fact excluded the testimony.

(b) The court erred in ruling as it did that petitioner must have known and was bound to learn by cross-examination that the witnesses in question were experts.

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (Walker v. Johnson, 312 U. S. 286, 85 L. Ed. 836.)

(c) As the testimony of the witnesses Tarr, Downing and Evans was never transcribed and has now been destroyed, the indisputable inference is, as petitioner claimed on the hearing, that no one of these witnesses was qualified or sworn as an expert (see authorities under Specification 4 hereinbelow).

(d) The exclusion of the evidence that these witnesses were not qualified or sworn as experts, was and is of the highest materiality:—it makes glaringly plain that, not being experts, they were not entitled (aside from the statutory prohibition), to be paid as such.

IV.

The destruction of the trial minutes by the Government through its "official court reporter," leaving only a transcript of the testimony of some of the government witnesses, has made it impossible for petitioner to show that the so-called expert witnesses were biased and prejudiced against him and that, through their testimony, and on the case as a whole, petitioner was denied a fair and impartial trial as guaranteed him by the Constitution of the United States and the Sixth Amendment thereto.

(a) The destruction of the minutes was the act of the government. It will be seen from the letter-head of the letter, that Russell N. Anderson, the writer of the letter, shows that he is and was the

"Official Court Reporter"

with an office at "313 Courthouse."

(b) The action of the "official court roporter" was the action of the government.

> "And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its law, may constitute State action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter v. Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581." (Mooney v. Holohan, 294 U. S. 112, 113, 79 L. Ed. 794.)

(c) The circumstances under which, and the time when, the minutes were destroyed leads inevitably to the inference that the Government intended thereby to cripple the petitioner in his efforts to set aside what he contends was

a conviction by unfair and illegal means, and to make it impossible for him to produce the evidence to prove this.

The hearing on habeas corpus in the trial court was on January 22, 1943. The argument in the Circuit Court of Appeals was heard October 21, 1943. In May 1943 petitioner had obtained funds with which to prosecute this proceeding at his own expense, and for use in the Circuit Court of Appeals he ordered the minutes. They had been preserved from the conclusion of the trial in February 1939 for over four years,—what possible excuse could there be for destroying them while petitioner's rights were not only undetermined, but being prosecuted, and when the appeal before the Circuit Court of Appeals was about to be heard? The effect on petitioner of the destruction of the minutes was disastrous regardless of what the motives for such action may have been.

(d) The petitioner is entitled to have this letter received and considered because the destruction of the minutes was first called to his attention by it after the hearing in the trial court, and because it is a certificate of the government, the disastrous effect of which on petitioner cannot be changed by any possible explanation as to motives.

The case is similar to *Waley* v. *Johnston*, 316 U. S. 101, in that there, as here—

> "* * * a conviction had been in disregard of the constitutional rights of the accused, and where a writ is the only effective means of preserving his rights," and the "* * * facts relied on are dehors the record, * * *."

The case is similar also to *Kendall* v. *Ewart*, 259 U. S. 139, in that in the case cited, as in that at bar, the proof dehors the record was admitted because it was furnished by appellee as it is here by the government.

As early as *Seavey* v. *Seymour*, 21 Fed. Cas. 947, 953, Judge Clifford laid down the rule that an appellate court would receive competent evidence which was offered and excluded in the trial court, because the party offering it on

appeal was unable to produce it below. The principle is the same here:—petitioner was unable to produce in the trial court evidence that the minutes had been destroyed, as the destruction occurred subsequent to the hearing.

In *McKnight* v. *Washington Nat. Ins. Co.*, 131 S. W. (2d) 1072 (Tex. Civ. App.), counsel for appellants stated that no evidence was heard by the trial court in ruling on issues of fact presented by appellee's plea in abatement and the appellate court had held that as a matter of law the plea was well taken and the statements were neither denied by appellee nor in conflict with the record, and the court accepted the statements as true. So, here the Government has stated that it destroyed the minutes which is not denied by petitioner nor is it in conflict with the record, and the statement should be accepted as true. (See also 9 Amer. & Eng. Anno. Cas. 949, 953.)

(e) The destruction by the Government of the minutes of trial leaves the government with no evidence to sustain the judgment and sentence and raises a conclusive presumption that there was no evidence sufficient to justify them,—that petitioner was innocent. The cases hold that the destruction of evidence by a party leaves the spoliator with no evidence to sustain his contention and no right to offer secondary evidence, and that a conclusive presumption arises that the evidence would prove the adversary's claim. Such cases have arisen largely in civil controversies, but the rule laid down should apply more strongly in favor of an accused and particularly one who was obliged to defend as a pauper and be his own attorney.

In the following cases it was held that where a party destroys evidence a conclusive presumption arises contrary to the position taken by him and in favor of the opposing party, which cannot be rebutted by secondary evidence, viz.—

> "Where part of material instrument is destroyed, presumption is that it was against interest of spoliator;

but where the entire instrument is willfully destroyed, presumption is conclusive that instrument would prove adversary's claim.—Middleton v. Middleton, 68 S. W. (2d) 1003, 188 Ark. 1022."

"Generally, every presumption is against intentional despoiler of documentary evidence.—Tilton v. Iowa Oil Co., 33 P. (2d) 446, 139 Cal. App. 93."

"Presumption that check was indorsed, 'in full settlement' arose from payee's obliteration of indorsement.—Deuches v. Grand Rapids Brass Co., 215 N. W. 392, 240 Mich. 266."

"Absence of documentary evidence concerning property of deceased and evidence of extent of property of sons warranted presumption that documentary evidence destroyed would establish widow's demand in suit against sons to establish trust.—Gaugh v. Gaugh, 11 S. W. (2d) 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S. W. (2d) 750, 321 Mo. 456."

"Where a paper is proved to have been destroyed or suppressed, or there is a strong suspicion of its having been done, the presumption in odium spoliatoris applies in favor of the party who claims under such paper, though the contents are not proved.—Askew v. Odenheimer, Fed. Cas. No. 587 (Baldw. 380)."

"The destruction of evidence warrants inference that the destroyed evidence contained statements of fact contrary to the position taken by the person destroying the evidence.—State ex rel. Department of Agriculture v. McCarthy, 299 N. W. 58, 238 Wis. 258."

"The intentional destruction of a letter creates a presumption that its contents were detrimental, which cannot be rebutted by secondary evidence.—Russell v. Bush, 71 So. 397, 196 Ala. 309."

"Everything will be presumed against the despoiler, so that where father, after executing deeds to children and delivering them in escrow to bank official, secured envelope from another official and returned it torn open, and on his death it was discovered no deed to particular son was inclosed, it must be presumed against children standing in father's shoes that there

was originally in the envelope an absolute deed to the son.—Hudson v. Hudson, 122 N. E. 497, 287 Ill. 286."

"Willfully despoiling a document will justify a presumption of law against the despoiler that the contents of the document were not as stated by him, but were as stated by his adversary.—Hunt v. Sanders, 232 S. W. 456, 288 Mo. 337."

"In an action for an accounting by mother's administrator against daughter who had collected insurance and rents due the mother, in which the daughter claimed to have spent the money and as the mother's agent, the amount claimed by the administrator to have been collected will be presumed to be the true amount under the doctrine of in odium spoliatoris, where daughter destroyed the books of original entry showing amount collected by her.—Haid v. Prendiville, 238 S. W. 452, 292 Mo. 552."

CONCLUSION.

The two courts below mistakenly held that the statutory prohibition of payment of witnesses more than $1.50 per day for testifying should be ignored, and overlooked the well considered cases, which have long been recognized as controlling, construing the general statute as prohibiting payments in excess of the statutory amount; they mistakenly overruled petitioner's offer to prove that the so-called expert witnesses were not qualified or sworn as such, and that the witness Tarr was prejudiced and biased against petitioner; all of which facts became known to petitioner and arose too late for him to avail himself of them by appeal, leaving this proceeding as his sole remedy. And, while this proceeding was pending in the Circuit Court of Appeals, the Government destroyed the minutes of testimony, and as there is only a partial transcript of the testimony of some of the prosecution's witnesses and no transcript of the testimony of any of the three witnesses, Tarr, Downing and Evans, what is left is not alone partial, but one-sided and therefore not only useless but harmful,

and the same in effect as though there was no transcript, which, as the Government cannot supply what is lacking by secondary evidence, raises the conclusive presumption that petitioner is sustained in his contention that his conviction was not justified by the evidence, but that there should have been a verdict of "not guilty," despite which he has been compelled to remain in prison since March, 1939, nearly five years, under this invalid verdict and judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Charles R. Pierce,
with Attorney on Brief.

RUSSELL N. ANDERSON
OFFICIAL COURT REPORTER
[illegible]
TACOMA, WASHINGTON

May 5, 1943.

Miss Dorothy Shallow,
C/o Tacoma Hotel,
TACOMA, Washington.

Dear Miss Shallow:

Confirming my statement to you this morning over the 'phone, please be advised that early this year I destroyed all notes which I took in the Walker-Sheehy trials in Federal Court. This would preclude my being able to furnish a transcript of the testimony of the witnesses Evans and Downing.

Regretting my inability to be of service, I am

Yours very truly,

Russell N. Anderson.

Russell N. Anderson.